THE SOURCE OF OBLIGATION IN BILATERAL CONTRACTS.

IT SEEMS to be usually supposed that what makes bilateral agreements obligatory is the simultaneous receipt by each party of present value in the form of words, just as debts are based upon the receipt of an equivalent or *quid pro quo*. Altho we talk glibly about promise for promise, there is some difficulty in explaining how spoken words are "goods sold and delivered" having tangible value in themselves.

In a recent article in this review, the late Dean Ashley discusses a conflict of opinion between himself and the present writer in regard to the element of consideration in bilateral contracts.[1] Since he seems to have entirely failed to understand the theory which I have attempted to advance, it may be well to restate my contentions as briefly and clearly as possible.

The various writers on this question do not differ so much as to the practical decision of cases as upon how to explain these cases by any rational, consistent and logical juristic theory. There is probably no more than normal difficulty for the practicing attorney to advise his inquiring client whether or not he has a contract based upon consideration. But there is abnormal difficulty for the professor to explain to his students what is really meant by the old and apparently simple formula that promise is consideration for promise in a bilateral contract.

Dean Ashley starts without discussion from the orthodox but arbitrary assumption that all consideration must be found in a present detriment, or at least in something of present value given in exchange for the promise. Assuming this premise that a bilateral contract is founded upon present detriment incurred, or

[1] See article entitled "The Doctrine of Consideration in Bilateral Contracts," by Clarence D. Ashley, 3 VA. L. REV. 201. Dean Ashley died suddenly on the evening of January 26, 1916. The present writer had formed with him a valued friendship which arose through an exchange of conflicting views on the subject of this article. While opposing his arguments, the writer wishes to express his deep appreciation of Dean Ashley's kindly attitude and stimulating interest.

upon present value given and received by each side at the instant the contract is made, one must seek this element either (1) in the obligations resulting from the promises, or (2) in the promises in fact, in the expression of assent as something of value. Dean Ashley takes the first alternative. Professor Williston, in order to avoid the fallacy of arguing in a circle from the result to the cause of the promises becoming binding, takes the second.[2] He gives up the *ignis fatuus* of present detriment, but he comes to much the same thing by adding the requirement that a promise to be of value must be a binding one.[3]

If Dean Ashley's theory that it is the legal obligation which furnishes the element of consideration, were carried into actual effect, it would indeed make a startling change in the law, but not along the line which he desires; for it would deny validity to many classes of contracts which it is well settled are perfectly binding. In many cases no legal obligation exists upon one party, yet nevertheless the other party is held liable. Such are cases of infancy, insanity, writings signed by only one party under the Statute of Frauds, contracts voidable for fraud, as by a married man becoming engaged to a woman ignorant of his status, and cases of illegal purpose on one side, but not on the other. In no case is lack of capacity to incur an obligation held to create a lack of consideration except in the married women cases. When these cases are examined, however, it is found that this language is employed when the married woman is a defendant. It is not easy to find cases where the courts have refused to enforce a contract at the instance of a married woman when she becomes plaintiff. It is then frequently said that coverture is a personal defense which cannot be pleaded by the other party for his own benefit.[4] It has recently been held by the United States Supreme Court that the Government may sue a contractor whose bid for transportation of coal has been accepted by the United States Navy Department, although the contract is unenforceable against

[2] 27 Harv. L. Rev. 503, 506.

[3] See article by the present writer, 28 Harv. L. Rev. 128.

[4] Moore *v.* Price, 116 Ala. 247, 22 South. 531; Carter *v.* Fischer, 127 Ala. 52, 28 South. 376; Ætna Ins. Co. *v.* Baker, 71 Ind. 102, 112; Bennett *v.* Mattingly, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; Pitts *v.* Elsler, 87 Tex. 347, 28 S. W. 518.

the United States because lacking statutory formalities.[5] So, it is submitted, a state could sue on a bilateral contract although as sovereign it could not be sued without its consent.

The principal class of cases which purport to be decided on the theory of mutuality of obligation are the so-called illusory contract cases. The language of these cases would seem to support Dean Ashley's theory, but they are in reality distinguishable. What the courts really require is not mutuality of obligation, but reciprocity in the terms of the bargain. There must be mutuality of engagement. If the plaintiff does not promise anything definite or certain in return, but leaves his performance entirely to his own choice or option, the contract is not of the reciprocal kind that merits enforcement. But where the lack of mutuality of obligation is due to some extrinsic defect outside of the terms of the bargain, such as incapacity of the plaintiff, Statute of Frauds, secret illegality in the defendant's purpose, or fraud on the plaintiff, this does not produce lack of consideration. Dean Ashley and Professor Williston are both unable to account for these cases except as hopeless and illogical exceptions to their theories. Yet the exceptions swallow up the rule. They may readily be explained and reconciled if we are willing to adopt a theory which fits the facts.[6]

My criticism of the obligation theory is that it does not explain the law, and that its fundamental premise is wholly needless and erroneous. As I have heretofore said, "the assumption of a requirement of present value received in bilateral contracts is as unnecessary to the theory of consideration as Professor Williston himself concedes Langdell's assumption of a present detriment to be."[7] The first simple contracts recognized were those founded upon an executed consideration, and the ground of obligation of the promise was the performance of the act requested. But as Street points out clearly in his Foundations of Legal Liability,[8] bilateral contracts are not founded upon consideration in the sense of present detriment, nor even upon present value re-

[5] United States *v.* New York, etc., Steamship Co., 239 U. S. 88.
[6] See article by the present writer, 28 Harv. L. Rev. 129-131.
[7] 28 Harv. L. Rev. 124, 125, 127.
[8] Vol. II, pp. 57, 107, 111, 119.

ceived in exchange. To attempt to explain the promises as being so founded is simply to indulge in fictions in order to gloss over the difference between executed and executory consideration. It naturally results in confusion worse confounded.

Dean Ashley argues that consideration as an element of contract is left out if the contract arises before the consideration is actually furnished. He fails to perceive the distinction between a contract becoming binding without any consideration (e. g. a promise to give), and a promise which becomes binding upon an executory consideration, where there is an expectation of a valuable counter performance as the basis of the promise. The element of consideration may thus be present in the bargain as an inducement making the agreement non-gratuitous, although it is not a thing or *res* actually furnished, but is merely something promised.

The doctrine which Dean Ashley suggests ought to be reached by legislation, judicial or otherwise, is that the source of obligation in mutual agreements, the sufficient reason for their enforcement, should be the intent of the parties to bind themselves and bring about a juristic act. Mr. Street, in his Foundations of Legal Liability, announces the discovery that this is even now the true theory, and that bilateral contracts are of a *consensual* nature, the ground of enforcement being mutual assent.

This is scarcely true of simple contracts. In covenants, signed, sealed and delivered, calling to witness the covenantor's hand and seal, the source of obligation is the consent or will of the party executing the deed to bind himself. It must be duly manifested so that the law will recognize it, but the formality and ceremony are merely the means of expressing and authenticating the intention to become bound.[9]

Although Mr. Street maintains in effect that "the mutual assent of the parties is the final and crowning ingredient in the convention," yet he admits that the doctrine of consideration has an important bearing on bilateral contracts. The content of the promises must be such that the doing of the act would be a good consideration for a unilateral contract; but he also maintains that

[9] Aller *v.* Aller, 40 N. J. Law 446.

a promise to do a thing may be a good consideration, even though the performance would not be, which seems clearly inconsistent and involves the absurdity of treating a bird in the hand as of less value than a bird in the bush.[10]

Bilateral contracts are not based upon consent alone, but upon consideration. They are binding not merely because they are agreements intended to be legally obligatory, but because they are agreements of a particular kind. Upon mutual promises to make and receive a gift an action cannot be maintained; but if the agreement contemplates some performance of possible value on each side, the transaction involves consideration. Business bargains must as a matter of course be obligatory. Business men must be enabled to rely upon them, or business could not be transacted.

Dean Ashley denies that the underlying policy of the law of consideration is the necessity of enforcing business bargains, but he fails to disclose any other. He argues "that a consideration is often named though it is quite evident that a gift was intended," but he fails to cite any authorities in support of this. It is believed that the law is otherwise. The recital of a nominal consideration would be a pure formality, and consideration is not merely a matter of form, but of the substance and nature of the agreement. The court will inquire as to the existence of contractual intent, and will not treat a promise to make a gift as a contract of sale, even if a bill of sale is given reciting the payment of a valuable consideration. This is very different from inquiring into the adequacy of a consideration which the parties have actually dealt with as an equivalent, or "conventional inducement." [11] In the case of Allen West Com. Co. *v.* Grumbles,[12] it is said: "It is not a rational inference that property of this value was sold for five dollars. * * * The natural inference from these recitals is that it was a voluntary assignment

[10] See 2 Street, Foundations of Legal Liability, pp. 111, 118, 119.

[11] Allen West Comm. Co. *v.* Grumbles, 129 Fed. 287; Velie Motor Car Co. *v.* Kopmeier, 194 Fed. 324; Presbyterian Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352; Schnell *v.* Nell, 17 Ind. 29; Murphy *v.* Reed, 125 Ky. 585, 101 S. W. 964; Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560; Baltimore *v.* Mali, 65 Md. 93, 3 Atl. 286.

[12] 129 Fed. 287, 289.

without valuable consideration and that the reference to the five dollars was the usual form of recital which is frequently inserted in instruments of this character when no valuable consideration is actually paid." The various terms of the agreement itself, the value of the subject matter, the relation between the parties, the circumstances surrounding them, and their intent as it may be deduced from these will show whether the agreement be gratuitous or not. If the purpose is to confer on the promisee a benefit from affection and generosity, the agreement is gratuitous. If the purpose is to obtain a *quid pro quo*, if there is something to be received in exchange, the promise is not gratuitous, and it becomes a binding bargain.[13]

Dean Ashley's proposal to saw off the entire rule of consideration in bilateral contracts as a rotten branch raises the question whether the law should enforce gratuitous promises, even if they are intended to be legally binding. It may well be doubted whether there is sufficient basis for this in the absence of special circumstances. When one receives a naked promise, and such promise is broken, he is no worse off than he was before, unless he has justifiably acted in reliance upon it. He gave nothing for it; he has lost nothing by it. Such promises may be lightly made, dictated by generosity, courtesy, or impulse, often by ruinous prodigality. To enforce them might make the law an instrument by which a man could be forced to be generous before he was just, and might bring such unfounded obligations into competition with the imperative duties owed to wife and children, or with debts owed for value actually received. Both the civil and the common law, therefore, require special formalities or circum stances to render gratuitous promises operative in law.[14]

If we are willing to acquiesce in certain liberal tendencies of the courts, we shall find that nearly every promise is now held binding where there is a just and meritorious reason for its enforcement. Even gratuitous promises without any reciprocity are enforced by many courts on grounds of *quasi-estoppel*, where the promisee is induced reasonably to act in reliance upon the promise; or upon grounds of honesty and justice, where the

[13] Bibb *v.* Freeman, 59 Ala. 612.
[14] Davis & Co. *v.* Morgan, 117 Ga. 504, 43 S. E. 732.

promise is an acknowledgment of a moral obligation arising from the past receipt of material value uncompensated for.[15] It would seem then that we do not need to seek for such a radical and improbable remedy for existing defects either in the law itself, or in the theory of the law, as the rooting out of the requirement of consideration altogether. The technicalities of consideration arise mainly in the attempt to measure the sufficiency and value of it. The basic principle or policy of the law is simple enough, namely, that gratuitous promises have in general no ground of enforcement except insofar as special circumstances like quasi-estoppel or moral obligation are recognized as an exception to the requirement of reciprocity. The typical contract is an agreement between the parties by which one thing is to be given for another. For the purpose of testing consideration, the law does not inquire whether the promises are mutually binding. It is sufficient that by the terms of the bargain the contemplated transaction is reciprocal and non-gratuitous, and that something of possible value may thereby be obtained by each party.

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[15] 11 Mich. L. Rev. 423, 425.